(13)

No. 96-1133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF OF THE UNITED STATES ARMY DEFENSE APPELLATE DIVISION, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

JOHN T. PHELPS II*
Colonel, U.S. Army
Chief, Defense Appellate Division

MICHAEL E. HATCH
Major, U.S. Army
Defense Appellate Attorney

* *Counsel of Record*

U.S. Army Legal Services Agency
Defense Appellate Division
5611 Columbia Pike
Falls Church, VA 22041
(703) 681-3572

STEPHEN P. BELL, JR.
Captain, U.S. Army
Defense Appellate Attorney

T. MICHAEL GUIFFRÉ
Captain, U.S. Army
Defense Appellate Attorney

PAUL FIORINO
Captain, U.S. Army
Defense Appellate Attorney

ARDEN B. LEVY
Captain, U.S. Army
Defense Appellate Attorney

54 pp

QUESTION PRESENTED

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgment of military defendants' right to present a defense.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases — Continued:

Cases — Continued:

Cases — Continued:

Cases — Continued:

Cases — Continued:

Cases — Continued:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

No. 96-1133

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF OF THE UNITED STATES ARMY DEFENSE APPELLATE DIVISION, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE[1]

The United States Army Defense Appellate Division is an agency of the United States Army Judge Advocate General's Corps. The Defense Appellate Division represents individual soldiers on appeal before the United States Army Court of Criminal Appeals, the United States Court of Appeals for the Armed Forces, and the United States Supreme Court.

The Defense Appellate Division represents all soldiers who receive either a punitive discharge or at least one year of confinement as a result of an Army court-martial. In 1996, the Division filed approximately 780 appellate pleadings with the Army Court of Criminal Appeals and nearly 400 pleadings with the Court of Appeals for the Armed Forces.

The Military Rules of Evidence, which are at issue in the case *sub judice*, apply to all Army courts-martial. Furthermore, Army judge advocates fre-

[1] Each party has given its consent, in writing, to the filing of this brief amicus curiae. Letters indicating such consent have been filed with the Clerk of the Court.

quently encounter polygraph issues in their practice. The Air Force Defense Appellate Division, representing the respondent, requested an amicus brief regarding the current status of polygraph admissibility among the many jurisdictions potentially affected by this decision. Given the authors' professional knowledge of the subject matter and the impact of this Court's decision on soldiers facing courts-martial, this amicus curiae brief represents the competent and informed viewpoint of a party with a legitimate interest in the outcome of this case.

SUMMARY OF ARGUMENT

The "general acceptance" test was the first measure by which polygraphs and scientific evidence were evaluated prior to admission in a trial. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In the wake of *Frye*, the vast majority of jurisdictions held polygraph evidence inadmissible *per se*. In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), this Court rejected the *Frye* test and provided a non-exclusive list of factors as part of a less-stringent test designed to ensure that the factfinder is presented with scientific knowledge which will assist it to understand or determine a fact in issue. The federal and state jurisdictions, with the exception of the military appellate courts, have failed to fully consider the Sixth Amendment implications of *per se* exclusions of defense proffered polygraphs.

In the post-*Daubert* period, several federal circuits have recognized that polygraph evidence has advanced in reliability as the technology evolved and will admit stipulated results into evidence. *E.g., United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989) (en banc). The majority of state and federal courts continue to exclude polygraphs regardless of whether *Daubert* or *Frye* is applied to the admissibility question. *See generally State v. Dean*, 307 N.W.2d 628 (Wis. 1981); *State v. Jones*, 446 S.E.2d 696 (N.C. 1996); *United States v. Alexander*, 526 F.2d 161 (8th Cir. 1975). The jurisdictions which admit polygraph expertise require a stipulation, *see State v. Valdez*, 371 P.2d 894 (Ariz. 1962) (in banc) *and Piccinonna*, with the exception of New Mexico, which has admitted polygraphs through a combination of case law and judicial promulgation of rules of evidence. *See State v. Dorsey*, 539 P.2d 204 (N.M. 1975) (held that polygraphs are admissible if the operator is qualified, the testing procedures were reliable, and the test of the particular subject was valid); N.M. Stat. Ann. § 11-707 (Michie 1993).

Although the military is a "specialized society separate from civilian society," the burden is on the Government to justify the denial of constitutional protections. *See, e.g., United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955). Polygraph evidence is not beyond the comprehension of military

courts given the admission of other types of far more problematic scientific evidence. The Government has failed to demonstrate that servicemembers are not entitled to present a defense, specifically exculpatory polygraphs.

This Court has yet to consider the impact that the Sixth Amendment will have on Federal Rule of Evidence 702[2] given the limited scope of *Daubert*'s civil law focus. The Court has applied the Sixth Amendment where necessary to protect due process rights. *See Washington v. Texas*, 388 U.S. 14 (1967) (state statute concerning incompetency of codefendants invalid); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (state hearsay rule compromises an accused's right to call witnesses); *Rock v. Arkansas*, 483 U.S. 44 (1987) (*per se* exclusion of evidence unconstitutional despite state's legitimate interest in barring unreliable evidence). Military Rule of Evidence 707 excludes polygraphs *per se* and therefore violates Airman Scheffer's due process rights given the rule's categorical exclusion.

This Court is at a critical juncture, one where scientific expertise collides head-on with the Sixth Amendment. The Court should recognize the accused's right to lay a foundation for the presentment of exculpatory polygraph evidence at trial. To that end, the amicus offer a proposed preliminary due process *Daubert* factor for trial judges to apply in criminal cases:

> The defense will be granted the opportunity to lay a foundation for the presentment of science-based expert evidence under a *Daubert*/Rule 403 analysis where the proffered evidence is relevant to a constitutional right of the accused. Admission of such proffered expertise is presumed in cases affecting a valid constitutional right and where the defense demonstrates the reliability of the technique.

The proposed due process factor would operate to allow the respondent an opportunity to lay a foundation toward the admission of exculpatory polygraphs, a scientifically-based technique. Admission of the results in the case *sub judice* would be presumed given the reliability of this polygraph, performed at the behest of a Government law enforcement agency. In conclusion, Airman Scheffer's Sixth Amendment right to present a defense cannot be eviscerated by a mechanical *per se* exclusionary rule of evidence, and the trial judge should have been able to consider whether the polygraph herein was reliable.

---

[2] Federal Rule of Evidence 702 and Military Rule of Evidence 702 are identical. [Hereinafter, both rules will be referred to collectively as Rule 702.]

ARGUMENT

I. *DAUBERT v. MERRELL DOW PHARMACEUTICALS, INC.*, COMPELS CRIMINAL COURTS TO CONSIDER ADMISSION OF POLYGRAPH EVIDENCE

Polygraph expertise, the pariah of scientific evidence, has long been the bane of criminal courts since 1923, when the "general acceptance" test was adopted as a significant admissibility hurdle for proponents of scientific evidence. *Frye*, 293 F. 1013 (D.C. Cir. 1923). Under the anachronistic assumption of the polygraph's failure to be generally accepted in the scientific community, most jurisdictions have treated this evidence with outright contempt.[3] Since *Frye*, many courts and commentators have ignored significant advances in the field, preferring to liken polygraph expertise to the chance associated with a coin flip.[4]

The rules regarding expert evidence radically changed with this Court's opinion in *Daubert*, when this Court rejected the *Frye* test in favor of a less stringent test to ensure that the factfinder is presented with scientific knowledge which will assist it to understand or determine a fact in issue.[5] The federal courts could no longer reflexively disregard polygraph evidence because it was not generally accepted in the scientific community. Yet, the roadblocks for polygraph evidence remain entrenched despite the plethora of other judicially acceptable expert fields.[6] Scientific acceptance aside, the federal and state

---

[3] *Peterson v. State*, 247 S.W.2d 110 (Tex. Crim. App. 1951); *Lee v. Commonwealth*, 105 S.E.2d 152 (Va. 1952); *see also* section II, *infra*.

[4] *See generally Commonwealth v. Mendes*, 574 N.E.2d 35, 39 (Mass. 1989) (citing D. Lykken, *The Lie Detector and the Law*, 8 Crim. Def. 19, 26 (1981)); *see also Britton v. Farmers Ins. Group*, 721 P.2d 303, 314 (Mont. 1986) (judge denied polygraph evidence after expert, Dr. Lykken, testified that "polygraph results have 'zero probative value' and that allowing polygraph evidence in the courtroom would be on a par to allowing testimony of astrologers and fortune tellers"); *and* W. Iacono & D. Lykken, "The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests," 1 *Modern Scientific Evidence* (D. Faigman et al. eds., 1997).

[5] "Many factors will bear on the inquiry and we do not presume to set out a definitive checklist or test" to include: whether the theory or technique can be tested, whether it has been subjected to peer review and publication, the known or potential rate of error, and whether it has been generally accepted within the relevant scientific community. *Daubert*, 509 U.S. at 593-94.

[6] Other expert evidence of controversial scientific reliability has been accepted by the courts. *See, e.g., United States v. Tsinnijinnie*, 91 F.3d 1285 (9th Cir. 1996) (no abuse of discretion for admission of psychological evidence of child abuse); *White v. Ieyoub*, 25 F.3d 245 (5th Cir. 1994) (upholding the admission of post-hypnotic identification by victim); *United States v. Houser*, 36 M.J. 392, 399 (C.M.A. 1993) (permitting testimony

jurisdictions, with the exception of the military appellate courts, have failed to consider the Sixth Amendment implications in *per se* exclusions of defense proffered polygraphs.

In 1987, the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces [hereinafter Armed Forces court]) recognized the scientific validity of polygraphy in *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987), *superseded by* Mil. R. Evid. 707. This landmark decision included language noting the "state of polygraph techniques is such that . . . results of a particular examination may be as good or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials." *Id.* at 253. As the facts demonstrated, *Gipson*, like most polygraph cases, involved disagreement between prosecution and defense experts as to the results but not to the underlying scientific foundation.[7] The insightful *Gipson* court concluded, well in advance of *Daubert*, that the *Frye* standard of expert admissibility had been "superseded and 'should be rejected as an independent controlling standard of admissibility.'" *Id.* at 251 (quoting *United States v. Downing*, 753 F.2d 1224, 1233-37 (3d Cir. 1985)). The oft-repeated argument that polygraphy is not generally accepted within the scientific community fell on deaf ears at the Armed Forces court given the advances in the field since the 1923 *Frye* decision.

A. A substantial number of jurisdictions admit polygraph expertise without regard for the defendant's Sixth Amendment right to present a defense

While the majority of jurisdictions have held polygraphs inadmissible, many state and federal courts have applied a stipulation requirement in admitting such evidence. The jurisdictions utilizing stipulations often apply other requirements such as written agreements, judicial discretion, and special jury instructions. Those courts which agree to stipulated results cannot now logically complain about any alleged unduly prejudicial impact on the jury's delib-

---

regarding the "typical" symptoms of rape trauma syndrome by expert who had not examined the victim in the case); *United States v. Antone*, 981 F.2d 1059 (9th Cir. 1992) (permitting child sexual-abuse expert testimony); *Arcoren v. United States*, 929 F.2d 1235, 1239-41 (8th Cir. 1991) (permitting evidence of battered woman syndrome).

[7] Both the defense and prosecution, which had offered to stipulate to the defense polygrapher's expertise, conducted polygraphs on the accused resulting in different conclusions. *Gipson*, 24 M.J. at 247.

erations.[8] At the forefront of the polygraph issue stands New Mexico with a comprehensive statutory scheme regarding admission. No federal or state case law expressly recognizes the Sixth Amendment rights at stake in the case at bar.

1. *Several federal circuits currently accept polygraphs*

Prior to the Supreme Court's decision in *Daubert*, the federal circuits generally adhered to the traditional approach of *per se* inadmissibility of polygraph evidence. *E.g., United States v. Bortnovsky*, 879 F.2d 30, 35 (2d Cir. 1989).[9] Despite general hostility toward polygraph evidence, however, some federal courts did allow the introduction of such evidence when it was admitted to prove a fact other than truthfulness. *E.g., United States v. Kampiles*, 609 F.2d 1233, 1244-45 (7th Cir. 1979) (admissible to rebut assertion of coerced confession).[10] In the 1980's, some federal circuits also recognized that polygraph results could be accepted into evidence when the parties stipulated to admissibility. *E.g., Piccinonna*, 885 F.2d 1529.[11]

---

[8] Petitioner asserts that polygraph evidence intrudes on the functions performed by the trier of fact because it is "shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi." *See* Petitioner's Brief at 26 (quoting *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975)). However, "[o]ne fear we [in the military justice system] do not have is that factfinders will be overwhelmed by polygraph testimony. The concern commonly expressed in that regard is that factfinders will place undue reliance on the myth of scientific infallibility, thereby deferring their historic function to the experts. A number of recent studies refute that contention, and their authors conclude that juries generally are capable of evaluating polygraph evidence and giving it due weight." *Gipson*, 24 M.J. at 253, n.11.

[9] *See also United States v. Soundingsides*, 820 F.2d 1232, 1241 (10th Cir. 1987); *United States v. Brevard*, 739 F.2d 180, 182 (4th Cir. 1984); *United States v. Fife*, 573 F.2d 369 (6th Cir. 1976); *United States v. Skeens*, 494 F.2d 1050 (D.C. Cir. 1974); *United States v. Frogge*, 476 F.2d 969, 970 (5th Cir. 1973).

[10] *See also Underwood v. Colonial Penn. Ins. Co.*, 888 F.2d 588 (8th Cir. 1989) (admissible to show motive, plan, scheme or design under Rule of Evidence 404(b)); *United States v. Miller*, 874 F.2d 1255, 1261 (9th Cir. 1989); *United States v. Lynn*, 856 F.2d 430, 432-33 (1st Cir. 1988) (terms of accomplice-witness' plea agreement, including requirement of polygraph test, admissible to show motive to fabricate); *United States v. Bowen*, 857 F.2d 1337, 1341 (9th Cir. 1988); *United States v. Johnson*, 816 F.2d 918, 923 (3d Cir. 1987) (admissible to rebut assertion of coerced confession); *United States v. Hall*, 805 F.2d 1410, 1416 (10th Cir. 1986) (admissible to explain why police did not conduct more thorough investigation); *United States v. Yeo*, 739 F.2d 385, 388 (8th Cir. 1984); *Tyler v. United States*, 193 F.2d 24 (D.C. Cir. 1951) (admissible to rebut assertion of coerced confession).

[11] *See also Wolfel v. Holbrook*, 823 F.2d 970, 972 (6th Cir. 1987); *Brown v. Darcy*, 783 F.2d 1389, 1396 n.13 (9th Cir. 1986); *Alexander*, 526 F.2d at 166.

Noting tremendous advances in polygraph instrumentation and technique, the Eleventh Circuit became the first in the federal system to prescribe an approach to allow the admission of polygraph testimony. In *Piccinonna*, the Eleventh Circuit outlined two instances where polygraph evidence may be admitted at trial. *Id.* at 1536. First, polygraph evidence is admissible when both parties stipulate in advance as to the circumstances of the test and the scope of its admissibility. *Id.* Second, polygraph evidence may be admitted to impeach or corroborate the testimony of a witness at trial. *Id.* If the second approach is used, the offering party must provide adequate notice to the opposing party, as well as reasonable opportunity to have its own polygraph expert administer a test covering substantially the same questions. *Id.* In addition, the admissibility of corroboration or impeachment testimony is governed by the Federal Rules of Evidence. For example, evidence that a witness passed a polygraph examination, used to corroborate that witness' in-court testimony, would not be admissible under Rule 608 unless and until the credibility of that witness has been attacked. *Id.* Even if these conditions are met, trial courts retain the discretion to exclude polygraph evidence on other grounds under the Federal Rules of Evidence, such as Rules 401 and 403. *Id.*

The first federal court of appeals to reconsider the admissibility of polygraph evidence in light of *Daubert* was the Fifth Circuit, in *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995). In *Posado*, the trial court refused to consider the admissibility of polygraph results offered by the defendants to prove that they were truthful when they denied consenting to a police search of their luggage. *Id.* at 431. The Fifth Circuit determined that a *per se* rule against polygraph evidence was incompatible with *Daubert*. *Id.* at 434. The Court proposed no other rule in its place, but rather authorized district courts to conduct reliability assessments of polygraph evidence. *Id.* at 432-34. *Posado* did emphasize, however, that Federal Rule 403 would play "an enhanced role" in connection with the admission of any novel scientific evidence, including polygraph results. *Id.* at 435-36 (noting that procedures followed by defendants reduced the possibility of unfair prejudice and increased reliability).[12]

Like the Fifth Circuit, other federal courts also have recognized that while

---

[12] After *Posado*, the Fifth Circuit again examined a district court's exclusion of polygraph evidence in *United States v. Pettigrew*, 77 F.3d 1500 (5th Cir. 1996). The Court held that the district court did not need to evaluate the scientific validity of the evidence under *Daubert* because the evidence could be excluded on other grounds. *Id.* at 1515 (defendant's offer failed to show evidence would assist the trier of fact to understand the evidence or determine a fact in issue).

Daubert invalidated the *Frye* test, it did not preclude other rules from excluding polygraph evidence. *United States v. Cordoba*, 104 F.3d 225, 228 (9th Cir. 1996) (recognizing that trial judge should evaluate admission under Rule 403); *United States v. Kwong*, 69 F.3d 663, 668-69 (2d Cir. 1995) (evidence excluded under Rule 403 because test questions were inherently ambiguous); *United States v. Sherlin*, 67 F.3d 1208, 1216-17 (6th Cir. 1995) (evidence excluded under Rule 403 where opposing party unaware of test until after its completion); *United States v. Pulido*, 69 F.3d 192, 205 (7th Cir. 1995) (evidence excluded because polygraph results were peripheral to the "core issues" of the case and proponent was otherwise able to successfully impeach witness); *Conti v. Commissioner*, 39 F.3d 658, 662 (6th Cir. 1994) (evidence excluded under Rule 403 because evidence was "unilaterally obtained").

2. *New Mexico's comprehensive scheme for admission of polygraph evidence is a model for all jurisdictions to emulate*

With its opinion in *State v. Dorsey*, 539 P.2d 204 (N.M. 1975), the Supreme Court of New Mexico initiated the only sustained period of general admission of polygraph results in any United States jurisdiction. In *Dorsey*, the New Mexico Supreme Court held that polygraph results are admissible if (1) the operator is qualified, (2) the testing procedures were reliable, and (3) the test of the particular subject was valid. *Id.* at 205.

In 1983, the Supreme Court of New Mexico promulgated New Mexico Rule of Evidence 11-707, establishing a comprehensive scheme for admitting polygraph evidence.[13] N.M. Stat. Ann. § 11-707 (Michie 1993).[14] In *State v. Sanders*, 872 P.2d 870 (N.M. 1994), the New Mexico Supreme Court held that

[13] New Mexico adopted Federal Rule of Evidence 702. N.M. Stat. Ann. § 11-702 (Michie 1993). New Mexico utilizes *Daubert* in determining admissibility of non-polygraph scientific evidence. *State v. Alberico*, 861 P.2d 192 (N.M. 1994).

[14] Currently, Rule 11-707 governs admissibility. *State v. Baca*, 902 P.2d 65, 70 (N.M. 1995). Rule 11-707 permits admission of polygraph evidence as to the truthfulness of any person called as a witness, provided that certain reliability requirements are met. N.M. Stat. Ann. § 11-707(c). The examination must be conducted by a qualified examiner who has at least five years experience administering or interpreting examinations or equivalent academic training, as well as at least twenty hours of continuing education during the twelve months prior to the examination offered in evidence. N.M. Stat. Ann. § 11-707(b). The examination must include at least two relevant questions, at least three charts and be quantitatively scored. N.M. Stat. Ann. § 11-707(c). The pretest interview and actual testing must be recorded on an audio or video recording device. N.M. Stat. Ann. § 11-707(e). Finally, the party intending to offer the evidence generally must provide thirty-day's written notice to the other party, including copies of the examiner's report, each chart, the audio or video recording of the pretest interview and actual testing, and a list of any prior examinations taken by the subject. N.M. Stat. Ann. § 11-707(d).

the trial court did not violate a defendant's right of confrontation by refusing to admit polygraph evidence of unproven reliability, where the defendant did not comply with the procedural requirements of Rule 11-707. The Court stated that "[a] defendant's right to present evidence on his own behalf is subject to his compliance with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.* at 877-78 (citing *Chambers v. Mississippi*, 410 U.S. at 302).

Although Rule 11-707 establish detailed requirements to promote polygraph validity, the court refused to follow a mechanical application of the rule and allowed the introduction of exculpatory polygraph evidence in *State v. Baca*, 902 P.2d 65 (N.M. 1995). Despite the defendant's failure to follow the notice requirements of Rule 11-707, the court held that justice and fairness dictated admission where the State administered the exam, knew of the results, and knew that the defendant intended to call the test administrator as a witness. *Id.* at 70.

New Mexico's comprehensive approach regarding admissibility of polygraph evidence is fair to all parties and ensures to the greatest extent possible the reliability of such evidence. Given New Mexico's broad admissibility of polygraph evidence, its courts have not had occasion to consider the constitutional ramifications of excluding such evidence. New Mexico's approach should be emulated by all jurisdictions.[15]

3. *Stipulated polygraph results are admissible in many states*

Alabama: The Supreme Court of Alabama permits the admission of polygraph evidence upon stipulation of the parties, subject to certain conditions which relate to the accused's knowledge of his rights thereunder and the trial court's discretion relating to the conduct of the test itself. *Ex parte Clements*, 447 So.2d 695 (Ala. 1984); *see also Hinton v. State*, 548 So.2d 547 (Ala. Crim. App. 1988), *aff'd sub nom Ex parte Hinton*, 548 So.2d 562 (Ala. 1989). Alabama has not reexamined this issue since *Daubert* was decided.[16]

Arizona: The State of Arizona led the way in establishing explicit guidelines for party agreements concerning admissibility of polygraph evidence.

[15] *See* James R. McCall, *Misconceptions and Reevaluation — Polygraph Admissibility After Rock and Daubert*, 1996 U. Ill. L. Rev. 363, 388 ("The New Mexico Supreme Court's comprehensive treatment of the important issues in polygraph admissibility in Rule 11-707 should become a model solution for courts to review in reconsidering the admissibility of such tests. In the treatment of technical aspects of polygraph examination protocol, the rule goes far beyond the case law or statutes of any other jurisdiction in providing usable standards."); *see also* amicus' proposed additional *Daubert* factor, *infra* at section III.D.

[16] Alabama has adopted federal Rule 702, Al. R. Evid. 202, and applies *Frye*. *See Ex parte Perry*, 586 So.2d 242 (Ala. 1991).

The Arizona Supreme Court held that polygraph evidence is admissible upon stipulation in criminal cases, when introduced to corroborate other evidence of a defendant's participation in the crime charged or to corroborate or impeach the testimony of a defendant. *State v. Valdez*, 371 P.2d 894 (Ariz. 1962) (in banc). *Valdez* articulated certain qualifications for admissibility:

(1) any stipulation must be in writing;

(2) notwithstanding any stipulation, admissibility is subject to the trial judge's discretion;

(3) the opposing party retains the right to cross-examine the expert; and

(4) the trial judge should provide a detailed instruction to the jury concerning the weight of the evidence and the purpose for which it is admitted. *Id.* at 900-01.

In *State v. Tinajero*, 935 P.2d 928, 931 (Ariz. Ct. App. 1997), the court reiterated that "[e]vidence regarding polygraph examination is inadmissible absent a stipulation by the parties."[17]

Arkansas: Arkansas is a polygraph stipulation state. *Misskelley v. State*, 915 S.W.2d 702, 715 (Ark. 1996); *Houston v. State*, No. CR 87-85, 1988 WL 14162 (Ark. Feb. 22, 1988) (per curiam); *Golston v. State*, 762 S.W.2d 398 (Ark. Ct. App. 1988).[18] Arkansas enacted a statute in 1975 stating that "[t]he results of any such examination as provided in this subchapter shall be inadmissible in all courts in this state." Ark. Code Ann. § 12-12-701 (Michie 1987). However, "the Arkansas Supreme Court has not interpreted this statute literally; rather, such test results are only admissible if both parties enter into a written stipulation agreeing on their admissibility." *Houston v. Lockhart*, 982 F.2d 1246, 1251 (8th Cir. 1993); *see also Wingfield v. State*, 796 S.W.2d 574 (Ark. 1990) (polygraph stipulation must be in writing).

California: California currently holds that evidence of a polygraph exam is admissible only upon stipulation by the parties. Polygraph evidence was inadmissible until 1982. *People v. Jones*, 343 P.2d 577 (Cal. 1959); *People v. Houser*, 193 P.2d 937 (Cal. Dist. Ct. App. 1948). In 1982, a California Court of Appeal criticized prior cases which did not question the validity of the inadmissibility determinations. *Witherspoon v. Superior Court*, 183 Cal. Rptr. 615 (Cal. Dist. Ct. App. 1982) (authorizing evidentiary hearings on reliability of polygraphs). The court noted that the term "unreliable" as applied to polygraphs is "an almost 'knee jerk' response, continued some sixty years since the original *Frye* decision, . . . [with judges] subjectively favor[ing] one side of a

[17] Arizona's rule of evidence for the testimony of experts follows Federal Rule 702. Ariz. R. Evid. 702. Despite *Daubert*, Arizona continues to apply *Frye* to admissibility of scientific evidence. *State v. Bible*, 858 P.2d 1152 (Ariz. 1994).

[18] Arkansas adopted the Federal Rules of Evidence and follows *Daubert*. Ark. R. Evid. 702; *Jones v. State*, 862 S.W.2d 242 (Ark. 1993).

dispute . . . ." *Id.* at 618. In 1983, the California legislature passed a statute which declared that polygraph evidence would be inadmissible without stipulations. Cal. Evid. Code § 351.1; *see also People v. Aontae D.*, 30 Cal. Rptr. 2d 176 (Cal. Ct. App. 1994) (upholding constitutionality of statute).[19]

Delaware: Absent a stipulation, polygraph examinations are held inadmissible in Delaware. *Thompson v. State*, 399 A.2d 194 (Del. 1979); *see also Melvin v. State*, 606 A.2d 69, 71 (Del. 1992) (admissible "when the prosecution and the defendant both stipulate to the admissibility"); *Foraker v. State*, 394 A.2d 208 (Del. 1978).[20]

Florida: In Florida, polygraph results were completely inadmissible to prove the guilt or innocence of a defendant. *Kaminski v. State*, 63 So.2d 339 (Fla. 1952). The current rule is that polygraph results are admissible upon the agreement or stipulation of the parties. *Davis v. State*, 520 So.2d 572 (Fla. 1988); *Delap v. State*, 440 So.2d 1242 (Fla. 1983).[21]

Georgia: The first Georgia case to explicitly hold polygraph evidence admissible upon stipulation was *State v. Chambers*, 239 S.E.2d 324 (Ga. 1977). *Accord Forehand v. State*, 477 S.E.2d 560 (Ga. 1996). This ruling overturned Georgia's *per se* inadmissibility policy. *Famber v. State*, 213 S.E.2d 525 (Ga. Ct. App. 1975).[22]

Idaho: The general rule in Idaho is that a polygraph examination is not admissible into evidence absent stipulation by both parties, even if exculpatory. *State v. Fain*, 774 P.2d 252 (Idaho 1989); *accord State v. Grube*, 883 P.2d 1069 (Idaho 1994). When parties do stipulate to admissibility, the trial court retains discretion to exclude evidence if it finds that an examiner was not qualified or that the conditions under which the test was administered were unfair. *Fain*, 774 P.2d at 257.[23]

Indiana: An expert may testify regarding polygraph examination results,

[19] California has not adopted federal Rule 702 and rejected *Daubert*, as applied to its evidence rules. Cal. Evid. Code § 801; *People v. Leahy*, 882 P.2d 321 (Cal. 1994) (in banc).

[20] Delaware follows the Federal Rules of Evidence in its provisions for expert testimony. Del. R. Evid. 702. The *Daubert* standard for admitting evidence is also used in Delaware. *State v. Ruthardt*, 680 A.2d 349 (Del. Super. Ct. 1996).

[21] The Florida statute regarding evidence is virtually identical to Federal Rule 702. Fla. Stat. ch. 90.702 (1994). The Florida Supreme Court rejected *Daubert*'s flexible standard of admissibility in favor of the stringent general acceptance *Frye* test for scientific evidence. *Flanagan v. State*, 625 So.2d 827 (Fla. 1993).

[22] The Georgia Code appears to reflect the intent of federal Rule 702, and under state case law, supports a *Daubert* standard for admitting scientific evidence. Ga. Code Ann. § 24-9-67 (1995); *Chester v. State*, 473 S.E.2d 759 (Ga. 1996) (Hunstein, J., concurring specially) (citing *Smith v. State*, 277 S.E.2d 678 (Ga. 1981)).

[23] Idaho follows the Federal Rules of Evidence. Idaho R. Evid. 702. Idaho has not addressed *Daubert* but follows a similar standard. *State v. Gleason*, 844 P.2d 691 (Idaho 1992).

provided the parties stipulate to admissibility. *McDonald v. State*, 328 N.E.2d 436 (Ind. Ct. App. 1975). This represents a modification of the general inadmissibility rule articulated in *Zupp v. State*, 283 N.E.2d 540 (Ind. 1972).[24]

Iowa: *State v. McNamara*, 104 N.W.2d 568 (Iowa 1960), is the leading case in Iowa on the admissibility of polygraph evidence when there is an agreement between the parties. *See also State v. Losee*, 354 N.W.2d 239, 242 (Iowa 1984) (exculpatory polygraph excluded due to absence of stipulation). The Supreme Court of Iowa has not expressed if *Daubert* applies to all scientific evidence but has followed the standard in the cases to date. *Williams v. Hedican*, 561 N.W.2d 817, 827 (Iowa 1997) (examined a civil case under *Daubert* analysis because neither party objected to using that standard at trial).[25]

Kansas: The Kansas Supreme Court held that polygraph results are inadmissible without a stipulation in *State v. Lassley*, 545 P.2d 383 (Kan. 1976). *Accord State v. Clemons*, 929 P.2d 749 (Kan. 1996). The requirements for admission are, first, a prior stipulation of the parties, and second, the trial judge's satisfaction that the examiner was qualified and that the test was conducted under proper conditions. *Lassley*, 545 P.2d at 385.[26] Further procedural requirements were established by the Kansas Supreme Court in *State v. Roach*, 576 P.2d 1082 (Kan. 1978) (e.g., written stipulation required; may cross-examine expert).

Nevada: In the absence of a stipulation, polygraph evidence is inadmissible in Nevada. *Corbett v. State*, 584 P.2d 704 (Nev. 1978) (relying on *State v. Valdez*, 371 P.2d 894 (Ariz. 1962) (in banc)); *accord Domingues v. State*, 917 P.2d 1364 (Nev. 1996); *American Elevator Co. v. Briscoe*, 572 P.2d 534 (Nev. 1977) (absent stipulation, polygraph inadmissible to impeach or to corroborate witness' testimony).[27]

New Jersey: New Jersey courts will admit polygraph evidence pursuant to a carefully drafted stipulation. *State v. Baskerville*, 374 A.2d 441 (N.J. 1977); *State v. McDavitt*, 297 A.2d 849 (N.J. 1972). At one time, polygraphs were

[24] Although not viewed as binding, Indiana recognizes the *Daubert* standard as "helpful" in applying Indiana Rule of Evidence 702. Ind. R. Evid. 702. *McGrew v. State*, 673 N.E.2d 787, 797 (Ind. Ct. App. 1996).

[25] Iowa follows the Federal Rules of Evidence. Iowa R. Evid. 702.

[26] Kansas has a rule of evidence which is similar, though not identical, to federal Rule 702. Kan. Stat. Ann. § 60-456 (1994). Kansas still holds that the *Frye* standard governs admissibility of expert scientific evidence. *Armstrong v. City of Wichita*, 907 P.2d 923 (Kan. Ct. App. 1996).

[27] Nevada follows the Federal Rules of Evidence in its provision for expert testimony. Nev. Rev. St. Ann. § 50. 285 (1996). Rather than adopt *Frye*, Nevada enacted statutes that set standards similar to *Daubert*. *Scantillanes v. State*, 765 P.2d 1147 (Nev. 1988).

inadmissible in criminal cases. *State v. Driver*, 183 A.2d. 655 (N.J. 1962).[28]

North Dakota: While the state Supreme Court generally holds polygraph evidence inadmissible, *State v. Pusch*, 46 N.W.2d 508 (N.D. 1950); *State v. Newnam*, 409 N.W.2d 79 (N.D. 1987), lower courts have suggested polygraphs may be admissible at trial by stipulation of the parties. *City of Bismarck v. Berger*, 465 N.W.2d 480, 481 (N.D. Ct. App. 1991). Additionally, in ruling on a motion for new trial, the trial court must consider stipulated polygraph test results. *State v. Olmstead*, 261 N.W.2d 880 (N.D. 1978); *Healy v. Healy*, 397 N.W.2d 71, 74 n.1 (N.D. 1986).[29]

Ohio: Ohio permits polygraph results based on the same restrictions established in *State v. Valdez*, 371 P.2d 894 (Ariz. 1962) (in banc). *Accord State v. Souel*, 372 N.E.2d 1318 (Ohio 1978); *State v. Hesson*, 675 N.E.2d 532, 541 (Ohio Ct. App. 1996). Some Ohio cases also have held polygraph results to be admissible where they were offered for a purpose other than to establish truthfulness. *State v. Kniep*, 622 N.E.2d 1138, 1142 (Ohio Ct. App. 1993).[30]

Utah: Utah will admit polygraphs by stipulation. *State v. Jenkins*, 523 P.2d 1232 (Utah 1974); *State v. Rowley*, 386 P.2d 126 (Utah 1963). A later case, *State v. Collins*, 612 P.2d 775 (Utah 1980), held that even if there is a stipulation, admissibility must be premised upon proof of the examiner's qualifications and the validity of the examination.[31]

Washington: The state of Washington accepts polygraph evidence when the parties stipulate, in writing, to its admission. *State v. Ross*, 497 P.2d 1343, 1347-48 (Wash. 1972); *accord State v. Gregory*, 910 P.2d 505 (Wash. 1996).[32]

Wyoming: In *Cullin v. State*, 565 P.2d 445, 455 (Wyo. 1977), the

[28] New Jersey has not adopted the Federal Rules of Evidence, and the State generally follows the *Frye* standard. *State v. Kelly*, 478 A.2d 364 (N.J. 1984); *State v. Dishon*, 687 A.2d 1074 (N.J. Super. Ct. App. Div. 1997).

[29] North Dakota has adopted Fed. R. Evid. 702. N.D. R. Evid. 702. In *City of Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D. 1994), the Supreme Court of North Dakota acknowledged the *Daubert* decision, but ultimately applied *Frye*.

[30] Ohio follows the Federal Rules of Evidence. Ohio R. Evid. 702. A test for admissibility of scientific evidence is similar to *Daubert*. *State v. Pierce*, 597 N.E.2d 107 (Ohio 1992).

[31] Utah's rule of evidence is identical to the Fed. R. Evid. 702. Utah R. Evid. 702. The Utah Supreme Court initially abandoned its exclusive reliance on *Frye* in favor of an "inherent reliability" test in *Phillips v. Jackson*, 615 P.2d 1228 (Utah 1980). *See also State v. Rimmasch*, 775 P.2d 388 (Utah 1989). This test "provides a more detailed and rigorous outline for trial courts to follow" than the *Daubert* standard. *State v. Crosby*, 927 P.2d 638, 642 (Utah 1996) (record failed to demonstrate that a polygraph lacking stipulation was reliable).

[32] Washington follows federal Rule 702. Wash. R. Rev. ER 702. In *State v. Jones*, 922 P.2d 806, 808 (Wash. 1996), the Washington Supreme Court followed the *Frye* standard of general acceptance for scientific evidence.

Wyoming Supreme Court recognized the admissibility of stipulated polygraph tests, but allowed for judicial discretion prior to their introduction. *See also Schmunk v. State*, 714 P.2d 724, 731 (Wyo. 1986) ("In the absence of a stipulation for admission, a conviction must be reversed when the results of a polygraph are revealed to the jury").[33]

B. Polygraph evidence is inadmissible *per se* in the majority of states

Very few states falling within the "inadmissible" category have addressed the constitutional ramifications of a *per se* rule precluding an otherwise reliable polygraph proffered by the defense. *See, e.g., Perkins v. State*, 902 S.W.2d (Tex. Ct. App. 1995); *State v. Porter*, No. SC 15363, 1997 WL 26502 (Conn. May 20, 1997).

Alaska: Polygraph tests have not yet been judicially accepted by Alaska appellate courts for use in criminal trials. *Troyer v. State*, 614 P.2d 313 (Alaska 1980); *Pulakis v. State*, 476 P.2d 474 (Alaska 1970).[34]

Colorado: Colorado employed the *Frye* test in 1981 and ruled that polygraphs were inadmissible. *People v. Anderson*, 637 P.2d 354, 358 (Colo. 1981) (en banc). Recently, in *People v. Lyons*, 907 P.2d 708 (Colo. Ct. App. 1995), the Colorado Court of Appeals rejected the argument that *Daubert* necessitated a change in polygraph admissibility. "*Daubert* concerned only the interpretation of the federal rules of evidence and was not decided on constitutional grounds. Hence, it is not binding on Colorado courts . . . . [W]hile [Colo. R. Evid.] 702 applies to certain types of novel scientific evidence, the *Frye* test still applies to polygraph evidence." *Id.* at 712 (citing *Lindsey v. People*, 892 P.2d 281 (Colo. 1995)) (other citations omitted).[35]

Connecticut: The Supreme Court of Connecticut recently applied *Daubert* in rejecting the admissibility of polygraph tests. *Porter*, 1997 WL 26502, at *6 . "We see no reason to abandon our well established rule of exclusion, and we conclude that polygraph evidence should remain *per se* inadmissible in all trial court proceedings in which the rules of evidence apply, and for all trial purposes, in Connecticut courts." *Id.* at *18.[36]

District of Columbia: The District of Columbia is a *per se* inadmissible

[33] Wyoming adopted federal Rule 702, and it applies *Daubert*. Wyo. R. Evid. 702; *Springfield v. State*, 860 P.2d 435 (Wyo. 1993).

[34] Alaska adopted federal Rule 702. Ak. R. Evid. 702. Alaska continues to follow *Frye*. *Mattox v. State Dep't of Revenue*, 875 P.2d 763 (Alaska 1994).

[35] Colorado Rule of Evidence 702 is identical to federal Rule 702 regarding scientific evidence admissibility. Colo. R. Evid. 702.

[36] Connecticut does not follow the Federal Rules. *Id.* at *33 (Berdon, J., concurring).

state. This policy was first established in *Smith v. United States*, 389 A.2d 1356, 1359 (D.C. 1978). *Accord Contee v. United States*, 667 A.2d 103, 104 n.4 (D.C. 1995).[37]

Hawaii: The current state of the law in Hawaii is that polygraph evidence is *per se* inadmissible. *State v. Antone*, 615 P.2d 101, 109 (Haw. 1980); *State v. Chang*, 374 P.2d 5, 11 (Haw. 1962).[38]

Illinois: Illinois is currently a *per se* inadmissible state with regards to polygraph evidence. Initially, stipulated polygraph evidence was acceptable. *People v. Zazzetta*, 189 N.E.2d 260, 263 (Ill. 1963) (rejecting, without stipulations, the results of polygraph examinations); *People v. Ferguson*, 405 N.E.2d 21, 25 (Ill. App. Ct. 1980). The stipulation approach was rejected in *People v. Baynes*, 430 N.E.2d 1070 (Ill. 1981) (citing *Alexander*, 526 F.2d at 168). Most recently, this rule of inadmissibility was reaffirmed by the Illinois Supreme Court in *People v. Gard*, 632 N.E.2d 1026, 1032 (Ill. 1994); *cf. People v. Melock*, 599 N.E.2d 941 (Ill. 1992) (polygraph admissible where relevant to an issue other than truthfulness).[39]

Kentucky: In 1991, Kentucky held that polygraph evidence is inadmissible. *Morton v. Commonwealth*, 817 S.W.2d 218, 222 (Ky. 1991) ("under no circumstances should polygraph results be admitted into evidence"). The Kentucky Supreme Court specifically overruled *Workman v. Commonwealth*, 580 S.W.2d 206 (Ky. 1979) and *Colbert v. Commonwealth*, 306 S.W.2d 825 (Ky. 1957), both of which had stated that polygraph results could be admissible if there were stipulations. *Morton*, 817 S.W.2d at 222.[40]

Louisiana: Polygraphs are inadmissible despite greater discretion given to trial judges for consideration of scientific evidence. *State v. Catanese*, 368 So.2d 975, 981 n.19 (La. 1979) ("[T]he policy reasons for excluding polygraph evidence in the present case are more compelling than the evidentiary rules relied upon in [*Chambers v. Mississippi*]."); *see also State v. Foret*, 628 So.2d 1116, 1123 (La. 1993). The *Catanese* court held that polygraph evidence could

[37] "Although there has been some suggestion that the District of Columbia abandon *Frye* in favor of Federal Rule of Evidence 702, the District of Columbia remains, to this point, a *Frye* jurisdiction." *Oxendine v. Merrell Dow Pharm., Inc.*, Civ. No. 82-1245, 1996 WL 680992, at *34 (D.C. Super. Oct. 24, 1996) (mem. op.).

[38] Hawaii's evidence statute is almost identical to the Federal Rules of Evidence. *See* Haw. Rev. Stat. § 626.1, Rule 702 (1995). While not addressing *Daubert*, Hawaii uses a similar rule. *State v. Montalbo*, 828 P.2d 1274 (Haw. 1992).

[39] Illinois does not follow the Federal Rules of Evidence; it rejected *Daubert* and continues to follow *Frye*. *People v. Lowitzki*, 674 N.E.2d 859 (Ill. App. Ct. 1996).

[40] Kentucky's Rule 702 is identical to federal Rule 702, but it was enacted in 1992 after the *Morton* decision. Ky. R. Evid. 702. While not specifically addressing polygraphs, Kentucky adopted the *Daubert* standard of review for admissibility of scientific evidence. *Mitchell v. Commonwealth*, 908 S.W.2d 100, 101 (Ky. 1995).

be admissible in the future, but that "there has not yet been enough judicial experience with polygraph evidence in Louisiana to provide an adequate basis for judicial rule making on this scale." 368 So.2d at 982.[41] In an interesting juxtaposition with its ruling on trial admissibility, the *Catanese* court holds that polygraph evidence is admissible "within judicial discretion" in certain post-trial proceedings. *Id.*

Maine: The Supreme Judicial Court of Maine has consistently held that "the results of polygraph tests and a party's willingness or unwillingness to take such a test are inadmissible." *State v. Gagne*, 343 A.2d 186, 192 (Me. 1975) (citing *State v. Casale*, 110 A.2d 588 (Me. 1954)); *see also State v. Trafton*, 425 A.2d 1320 (Me. 1981); *State v. Mower*, 314 A.2d 840, 841 (Me. 1974)).[42]

Maryland: The Court of Appeals of Maryland is firmly rooted in its opposition to admitting polygraph tests for any purpose. *State v. Hawkins*, 604 A.2d 489, 492 (Md. 1992); *see also Johnson v. State*, 495 A.2d 1, 14 (Md. 1985). The case law, however, does suggest that polygraphs may be admissible if reliability of the testing improves. *Kelley v. State*, 418 A.2d 217, 219 (Md. 1980).[43]

Massachusetts: Massachusetts currently excludes polygraph evidence as inadmissible *per se*. *Commonwealth v. Stewart*, 663 N.E.2d 255 (Mass. 1996). However, Massachusetts is generally regarded as the first state to permit limited admissibility of polygraph evidence. In *Commonwealth v. A Juvenile (No. 1)*, 313 N.E.2d 120, 126-27 (Mass. 1974), the court held that polygraph evidence was admissible upon compliance with detailed procedural requirements, to include stipulation by the parties and "close scrutiny" of the examiner's qualifications. *Commonwealth v. Vitello*, 381 N.E.2d 582, 596-97 (Mass. 1978), recognized that polygraph evidence is admissible to impeach or corroborate the defendant's testimony, but excluded polygraph evidence during the case in chief because the defendant did not testify. The court specifically declined to consider the admissibility of polygraphs where the defendant's truthfulness is an ultimate issue. *Id.* at 596 n.23.

The exceptions of *A Juvenile* and *Vitello* were overruled in *Commonwealth v. Mendes*, 547 N.E.2d 35 (Mass. 1989). "[O]ur hope that polygraphy would mature to the point of general scientific acceptance has not materialized.

---

[41] Louisiana adopted federal Rule 702 in 1989 and subsequently adopted *Daubert*'s analysis for assessing reliability. La. C.E., art. 702; *State v. Foret*, 628 So. 2d 1116 (La. 1993).

[42] Maine follows federal Rule 702. Me. R. Evid. 702. While using a similar standard, Maine has not specifically addressed *Daubert*. *State v. Preston*, 581 A.2d 404 (Me. 1990).

[43] The Maryland rule of scientific evidence specifically incorporates *Daubert*. Md. Rule 5-702. "Maryland Rule 5-702's three-pronged test demands a more detailed preliminary inquiry than Federal Rule of Evidence 702." Kevin M. Carroll, *The New Maryland Rules of Evidence: Survey, Analysis and Critique*, 54 Md. L. Rev. 1085, 1087 (1995).

Further hope or expectation in that regard is no longer warranted. Thus, whatever justification there may have been for our single departure from the *Frye* rule in *A Juvenile* and *Vitello*, that justification no longer exists. . . . We announce that polygraphic evidence, with or without pretest stipulation, is inadmissible in criminal trials in [Massachusetts] either for substantive purposes or for corroboration or impeachment of testimony." *Mendes*, 547 N.E.2d at 41.[44]

Michigan: Michigan holds polygraph evidence to be inadmissible. *People v. Davis*, 72 N.W.2d 269 (Mich. 1955); *People v. Becker*, 2 N.W.2d 503 (Mich. 1942). However, polygraph evidence may be considered by a judge in ruling on a motion for new trial. *People v. Barbara*, 255 N.W.2d 171, 181-94 (Mich. 1977).[45]

Minnesota: Minnesota rejects polygraphs as inadmissible *per se*. *State v. Opsahl*, 513 N.W.2d 249, 253 (Minn. 1994); *State v. Kolander*, 52 N.W.2d 458, 465 (Minn. 1952). The Minnesota Court of Appeals addressed, and rejected, the argument that the polygraph results should be admissible based on stipulations in *State v. Litzau*, 377 N.W.2d 53 (Minn. Ct. App. 1985).[46]

Mississippi: Mississippi's inadmissible *per se* position can be traced back to *Hawkins v. State*, 77 So.2d 263 (Miss. 1955). *See also Carr v. State*, 655 So.2d 824 (Miss. 1995); *Thorson v. State*, 653 So.2d 876 (Miss. 1994). Mississippi has held, however, that "evidence of an offer to take a polygraph is only admissible to support the credibility of a witness whose veracity has previously been attacked." *Lester v. State*, 692 So.2d 755, 787 (Miss. 1997) (citing *Conner v. State*, 632 So.2d 1239, 1258 (Miss. 1993)).[47]

Missouri: Originally, Missouri courts admitted polygraphs results upon stipulation. *State v. Fields*, 434 S.W.2d 507 (Mo. 1968); *see also State v. Ghan*, 558 S.W.2d 304 (Mo. Ct. App. 1977). The Missouri Supreme Court corrected the "erroneous" interpretation that *Fields* authorized inadmissible

---

[44] Although Massachusetts has not adopted federal Rule 702, it applies a *Daubert* analysis to determine the admissibility of scientific evidence. *Commonwealth v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994).

[45] Michigan adopted federal Rule 702 in 1978. Mich. R. Evid. 702. However, it has yet to reject *Frye* in favor of *Daubert*. *People v. McMillan*, 539 N.W.2d 553 (Mich. Ct. App. 1995).

[46] Minnesota adopted federal Rule 702 in 1977. Minn. R. Evid. 702. The Minnesota Supreme Court has expressed no opinion regarding whether or not *Daubert* supersedes *Frye* for purposes of interpreting the Minnesota Rules of Evidence. *See State v. Klawitter*, 518 N.W.2d 577, 578 n.1 (Minn. 1994).

[47] Mississippi has a polygraph licensing statute: "Nothing in this chapter shall be construed as permitting the results of truth examinations or polygraph examinations to be introduced or admitted as evidence in a court of law." Miss. Code Ann. § 73-29-47 (1995). Mississippi follows federal Rule 702 and applies the *Frye* test. Miss. R. Evid. 702; *Polk v. State*, 612 So.2d 381 (Miss. 1992).

polygraph evidence to be admitted upon stipulation in *State v. Biddle*, 599 S.W.2d 182, 191 (Mo. 1980) (en banc). *Biddle* controls Missouri's current policy on polygraph evidence. *State v. Burch*, 939 S.W.2d 525, 528 (Mo. Ct. App. 1997) (polygraph evidence inadmissible in criminal trials).[48]

Montana: Montana strongly opposes the admission of polygraph examinations. *State v. Staat*, 811 P.2d 1261, 1262 (Mont. 1991); *State v. Hollywood*, 358 P.2d 437 (Mont. 1960). "[C]ourts continue to doubt the 'lie detector's' reliability." *State v. McClean*, 587 P.2d 20, 22-23 (Mont. 1978) (citing *Alexander*, 526 F.2d at 165). In *State v. Bashor*, 614 P.2d 470, 480 (Mont. 1980), Montana specifically rejected New Mexico's approach to polygraph evidence.[49]

Nebraska: Nebraska uniformly disfavors polygraph evidence. *State v. Allen*, 560 N.W.2d 829, 842 (Neb. 1997); *State v. Houser*, 450 N.W.2d 697, 702 (Neb. 1990); *Boeche v. State*, 37 N.W.2d 593, 597 (Neb. 1949).[50]

New Hampshire: New Hampshire follows the general rule that polygraph evidence is not admissible. *State v. Ober*, 493 A.2d 493 (N.H. 1985); *State v. LaForest*, 207 A.2d 429 (N.H. 1965). However, New Hampshire has not ruled whether stipulated polygraph tests are admissible. *See LaForest*, 207 A.2d at 431; *and State v. Stewart*, 364 A.2d 621, 623-24 (N.H. 1976) (declining to rule on the issue, but noting that the Massachusetts case of *Commonwealth v. A Juvenile (No. 1)*, 313 N.E.2d 120 (Mass. 1974), held that stipulated polygraphs are admissible).[51]

New York: New York views polygraph evidence as unreliable and inadmissible. *People v. Angelo*, 666 N.E.2d 1333 (N.Y. 1996); *People v. Shedrick*, 489 N.E.2d 1290 (N.Y. 1985); *People v. Leone*, 255 N.E.2d 696 (N.Y. 1969).[52]

---

[48] Missouri follows federal Rule 702. Mo. Ann. Stat. § 490-050 (1996). The State acknowledged *Daubert*, but continues to follow *Frye*. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo. 1993).

[49] Montana's rule concerning scientific evidence admissibility is the same as federal Rule 702. Mont. Code Ann. 26-10-702 (1995). Montana has adopted *Daubert*. *State v. Moore*, 885 P.2d 457 (Mont. 1994).

[50] Nebraska adopted federal Rule 702, but continues to follow *Frye* to measure scientific evidence. Neb. Rev St. § 27-702 (1995); *see State v. Case*, 553 N.W.2d 173, 184 (Neb. Ct. App. 1996); *State v. Carter*, 524 N.W.2d 763 (Neb. 1994).

[51] New Hampshire has language identical to federal Rule 702. N.H. R. Evid. 702. However, New Hampshire has not yet addressed whether *Daubert* applies to its evidentiary rule. *See State v. Cavaliere*, 663 A.2d 96, 97 (N.H. 1995) (holding that because the parties stipulated to use of *Daubert* instead of *Frye*, the issue need not be addressed).

[52] New York has not adopted the Federal Rules of Evidence. The New York standard for admitting scientific evidence is the *Frye* standard. *People v. Wesley*, 633 N.E.2d 451, 454 n.2 (N.Y. 1994); *People v. Victory*, 631 N.Y.S.2d 805, 811 n.12 (N.Y. Crim. Ct. 1995) ("New York which does not model its evidence 'rules' on the Federal Code still follows the *Frye* standard.").

North Carolina: At one time, North Carolina allowed for admission of polygraph evidence where the parties stipulated to admissibility. *State v. Meadows*, 295 S.E.2d 394 (N.C. 1982); *State v. Milano*, 256 S.E.2d 154, 163 (N.C. 1979) (polygraph stipulation must be in writing). However, North Carolina changed its stance on polygraphs and ruled instead that they are inadmissible *per se*. *State v. Grier*, 300 S.E.2d 351 (N.C. 1983); *see also State v. Jones*, 466 S.E.2d 696 (N.C. 1996). Although not specifically endorsing *Daubert*, North Carolina case law applies a similar test. *State v. Spencer*, 459 S.E.2d 812 (N.C. Ct. App. 1995).[53]

Oklahoma: Prior to 1975, parties could stipulate to the admissibility of polygraph evidence in Oklahoma. *See Castleberry v. State*, 522 P.2d 257 (Okla. Crim. App. 1974); *Jones v. State*, 527 P.2d 169 (Okla. Crim. App. 1974). This option was foreclosed in *Fulton v. State*, 541 P.2d 871 (Okla. Crim. App. 1975) (per curiam). *Accord Birdsong v. State*, 649 P.2d 786, 788 (Okla. Crim. App. 1982). Now, "it is well settled that the results of a polygraph test are not admissible for any purpose." *Paxton v. State*, 867 P.2d 1309, 1323 (Okla. Crim. App. 1993).[54]

Oregon: Oregon generally holds polygraph evidence to be inadmissible. Initially, Oregon allowed the introduction of such evidence in limited circumstances. *State v. Green*, 531 P.2d 245 (Or. 1975) (admissible to rebut an assertion of coerced confession); *State v. Brown*, 687 P.2d 751 (Or. 1984) (admissible upon stipulation). However, the Oregon Supreme Court overruled *Green* and *Brown* in *State v. Lyon*, 744 P.2d 231 (Or. 1987), holding that polygraph test results are inadmissible, even where the parties stipulate to introduction.[55]

Pennsylvania: In 1955, Pennsylvania refused to admit polygraph evidence and has maintained its position to this day. *Riccio v. Dilworth*, 115 A.2d 865 (Pa. Super. Ct. 1955); *see also Commonwealth v. Butler*, 621 A.2d 630, 632 (Pa. Super. Ct. 1993); *Commonwealth v. Brockington*, 455 A.2d 627 (Pa. 1983). The inadmissibility rule holds even if there is a stipulation. *Commonwealth v. Pfender*, 421 A.2d 791 (Pa. Super. Ct. 1980).[56]

---

[53] North Carolina adopted federal Rule 702 in 1983, *see* N.C. Gen. Stat. § 8C-1, Rule 702 (1997), and had rejected *Frye* prior to the *Daubert* decision. *See State v. Pennington*, 393 S.E.2d 847 (N.C. 1990).

[54] Oklahoma adopted federal Rule 702 in 1978. Okla. Stat. Ann. tit. 12, § 2702 (West 1993). *Daubert* was adopted in *Taylor v. State*, 889 P.2d 319 (Okla. Crim. App. 1995).

[55] Oregon follows Fed. R. Evid. 702. Or. Rev. St. § 40.410 (1988). Oregon chose not to follow a strict adherence to *Frye* or *Daubert*, preferring to administer a traditional Rule 401/403 balancing test. *State v. Lyons*, 924 P.2d 802 (Or. 1995).

[56] Pennsylvania does not follow the Federal Rules of Evidence. Pennsylvania also refused to adopt *Daubert*, continuing to follow *Frye* for admitting scientific evidence. *Commonwealth v. Blasioli*, 685 A.2d 151, 160 n.19 (Pa. Super. Ct. 1996).

Rhode Island: Rhode Island has taken the position that polygraph examinations are scientifically unreliable and inaccurate. *State v. Dery*, 545 A.2d 1014 (R.I. 1988). The Rhode Island Supreme Court was concerned that a subject might employ "countermeasures" leading to inaccurate polygraph results. *Id.* at 1017; *see also State v. Juarez*, 570 A.2d 1118 (R.I. 1990) (holding polygraph evidence inadmissible). In reviewing whether *Dery* survives under *Daubert*, the Rhode Island Supreme Court noted that "[*Dery*] was based not only on the *Frye* standard, but also on the inaccuracy of the polygraph test .... *Dery* is therefore consistent with the opinion of the Supreme Court in *Daubert*." *In re Odell*, 672 A.2d 457, 459 (R.I. 1996) (per curiam).[57]

South Carolina: The state of South Carolina does not allow evidence from polygraph examinations. *State v. Copeland*, 300 S.E.2d 63, 69 (S.C. 1982); *see also State v. Wright*, 471 S.E.2d 700 (S.C. 1996).[58]

South Dakota: After noting that a majority of states did not permit admission of polygraph evidence, the Supreme Court of South Dakota held it was not "persuaded that [South Dakota] should abandon the traditional rule of inadmissibility in favor of a rule that defendants and complaining witnesses may be ordered to submit to polygraph examinations upon a defendant's motion and that the results of such examinations be admissible at trial." *State v. Watson*, 248 N.W.2d 398, 399 (S.D. 1976); *accord State v. Muetze*, 368 N.W.2d 575 (S.D. 1985); *see also Sabag v. Continental South Dakota*, 374 N.W.2d 349 (S.D. 1985) (polygraph inadmissible in civil or criminal cases).[59]

Tennessee: Tennessee rejects polygraph evidence in criminal prosecutions. *Marable v. State*, 313 S.W.2d 451 (Tenn. 1958); *see also State v. Campbell*, 904 S.W.2d 608 (Tenn. Crim. App. 1995). Potentially exculpatory evidence is still inadmissible. *State v. Irick*, 762 S.W.2d 121 (Tenn. 1988); *see also State v. Land*, 681 S.W.2d 589 (Tenn. Crim. App. 1984).[60]

Texas: Texas' doctrine of *per se* inadmissibility dates back to *Peterson v. State*, 247 S.W.2d 110 (Tex. Crim. App. 1951). "[T]his Court has not yet

[57] Rhode Island follows federal Rule 702. R.I. R. Evid. 702. Rhode Island has left open the extent to which *Daubert* will be applied in its jurisdiction. *State v. Quattrocchi*, 681 A.2d 879, 884 n.2 (R.I. 1996).

[58] South Carolina has adopted Federal Rule 702, although it never officially adopted *Frye* or *Daubert* for its standard of admitting scientific evidence. S.C. R. Evid. 702; *see State v. Morgan*, 485 S.E.2d 112, 115 (S.C. 1997).

[59] South Dakota adopted federal Rule 702 in 1978, and has subsequently applied the *Daubert* analysis. S.D. Codified Laws Ann. § 19-15-2 (1995); *State v. Hofer*, 512 N.W.2d 482, 484 (S.D. 1994).

[60] Tennessee adopted federal Rule 702 in 1990. Tenn. R. Evid. 702. The State uses a standard of admissibility similar to *Daubert*. *State v. Schimpf*, 782 S.W.2d 186 (Tenn. Crim. App. 1989).

authorized the admission of such evidence on behalf of the State, and, until this is done, it cannot be admitted on behalf of the defendant." *Id.* at 111; *see also Chandler v. State*, 744 S.W.2d 341, 344 (Tex. Ct. App. 1988) (exculpatory polygraph inadmissible). The doctrine also effectively prevents the parties from stipulating to use of the results at trial. *Nethery v. State*, 692 S.W.2d 686 (Tex. Crim. App. 1985) (en banc).[61]

Vermont: In *State v. Hamlin*, 499 A.2d 45 (Vt. 1985), the Supreme Court of Vermont upheld the trial court's decision to exclude polygraph evidence because an adequate foundation had not been laid. However, the court left open "the proper standard for disposing of such issues — the scientific reliability of polygraph tests, the qualifications of the examiner, and the wide range of variables produced by different subjects." *Id.* at 54.[62]

Virginia: Polygraph evidence may not be admitted in Virginia. *Lee v. Commonwealth*, 105 S.E.2d 152 (Va. 1952). "Polygraph examinations are so thoroughly unreliable as to be of no proper evidentiary use whether they favor the accused, implicate the accused, or are agreed to by both parties." *Taylor v. Commonwealth*, 348 S.E.2d 36, 38 (Va. Ct. App. 1986); *see also Odum v. Commonwealth*, 301 S.E.2d 145 (Va. 1983) (stipulated results not admissible).[63]

West Virginia: The West Virginia Supreme Court of Appeals held that "polygraph evidence is not admissible in [West Virginia]." *State v. Frazier*, 252 S.E.2d 39, 50 (W. Va. 1979); *see also State v. Sheppard*, 310 S.E.2d 173, 192 (W. Va. 1983). Recently, West Virginia has acknowledged its willingness to admit polygraph evidence for witness impeachment purposes. *State v. Blake*, 478 S.E.2d 550 (W. Va. 1996).[64]

Wisconsin: In *State v. Dean*, 307 N.W.2d 628 (Wis. 1981), the Wisconsin Supreme Court declared previously acceptable polygraph evidence to be inadmissible. This case overruled the stipulation allowance of previous precedent under *State v. Stanislawski*, 216 N.W.2d 8 (Wis. 1974). *Le Fevre v. State*, 8

[61] Texas adopted federal Rule 702 in 1986. Tex. R. Crim. Evid. 702. While disclaiming the *Frye* standard and not specifically addressing *Daubert*, Texas has found that the *per se* inadmissible rule survives constitutional scrutiny under the state evidence statute. *Perkins*, 902 S.W.2d 88.

[62] Vermont also adopted federal Rule 702 in 1983. Vt. R. Evid. 702. Although not specifically stating so, Vermont appears to apply *Daubert* when testing scientific evidence. *See State v. Rolfe*, 686 A.2d 949 (Vt. 1996) (concerning infrared spectrophotometery).

[63] Virginia adopted federal Rule 702 for civil cases only. Va. Code Ann. § 8.01-401.1 (1992). A standard similar to *Daubert* governs admissibility. *Spencer v. Commonwealth*, 393 S.E.2d 609 (Va. 1990).

[64] West Virginia follows federal Rule 702. W.V. R. Evid. 702. West Virginia also follows *Daubert* in analyzing scientific evidence. *Wilt v. Burbacker*, 443 S.E.2d 196 (W. Va. 1993). However, the Supreme Court of Appeals held that *Daubert* does not necessitate a change in the inadmissibility of polygraph evidence. *State v. Beard*, 461 S.E.2d 486 (W. Va. 1995).

N.W.2d 288 (Wis. 1943), appears to be the first reported case of stipulated use of polygraph evidence among the states.[65]

II. MILITARY RULE OF EVIDENCE 707 WORKS TO UNCONSTITUTIONALLY DEPRIVE A MILITARY ACCUSED THE OPPORTUNITY TO PRESENT A DEFENSE

This Honorable Court displayed great foresight in the non-exclusive listing of *Daubert* admissibility factors. 509 U.S. at 593-94. *Daubert* must now undergo the next logical evolution for application to criminal trials in a manner consistent with the Constitution.

A. Due process applies to the military justice system

Although the military is a "specialized society separate from civilian society," the burden is on the Government to justify any departure from principal constitutional protections. *See, e.g., United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955) ("There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution."); *Parker v. Levy*, 417 U.S. 733, 743 (1974) (character of military community and mission requires a different application of First Amendment protections where speech may undermine effectiveness of response to command). This Court has previously considered due process challenges to courts-martial in determining whether a servicemember received "'a fair trial in a fair tribunal.'" *Weiss v. United States*, 510 U.S. 163, 178 (1994) (appointment of military judges does not violate appointments clause) (citations omitted). This Courts' opinions concerning the Constitution's application to the military justice system have exhibited a theme of extending constitutional rights to servicemembers without limitation, except where necessary due to the unique character of the military.

Petitioner suggests that some Sixth Amendment protections, including the right to present a defense, are 'procedural complexities' which burden military trials. *See* Petitioner's Brief at 42 (citing *Middendorf v. Henry*, 425 U.S. 25 (1976)). Apparently, complex issues regarding polygraph evidence are deemed beyond the comprehension of military courts despite the admission of other types of scientific evidence.[66] While the President and Congress may establish

[65] Wisconsin follows the Federal Rules of Evidence. Wis. Stat. Ann. § 907.02 (West 1993). The State applies a standard similar to *Daubert*. *State v. Walstad*, 351 N.W.2d 469 (Wis. 1984).

[66] Examples of complex expert evidence admissible in a court-martial include: DNA, *United States v. Youngberg*, 43 M.J. 379 (C.A.A.F. 1995); chemical hair fiber analysis, *United States v. Nimmer*, 43 M.J. 252 (C.A.A.F. 1995), rape trauma syndrome, *United States v. Houser*, 36 M.J. 392 (C.M.A. 1993); and urinalysis, *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986).

rules for courts-martial, U.S. Const. art. I, § 8, cl. 14, it is axiomatic that neither is free to disregard the Constitution when acting in the area of military affairs. *See Rostker v. Goldberg*, 453 U.S. 57, 67 (1967). "Congress remains subject to the limitations of the Due Process Clause, . . . but the tests and limitations to be applied may differ because of the military context." *Id.* Therefore, Petitioner's burden, which has failed thus far, is to demonstrate whether the Sixth Amendment right to present a defense does not apply to the military.

B. *Daubert*'s focus on civil trial evidence standards fails to accord and account for constitutionally-based protections inherent in criminal cases

This Court's pronouncement in *Daubert* signaled an end to the stringent "general acceptance" test in the federal courts. Unfortunately *Daubert*, based on a civil lawsuit, has been blindly applied without consideration of constitutional concerns in the vast majority of criminal cases. *See, e.g., United States v. Schneider*, 111 F.3d 197 (1st Cir. 1997); *United States v. Rouse*, 111 F.3d 561 (8th Cir. 1997); *Newkirk v. Commonwealth*, 937 S.W.2d 690 (Ky. 1997); *State v. Wyatt*, 482 S.E.2d 147 (W. Va. 1996); *cf. United States v. Posado*, 57 F.3d 428 (5th Cir. 1995); *but see State v. Porter*, No. SC 15363, 1997 WL 265202 (Conn. May 20, 1997) (no right to evidentiary hearing on polygraph under Sixth Amendment); *Perkins v. State*, 902 S.W.2d 88 (Tex. Ct. App. 1995) (*per se* inadmissible rule does not violate Sixth Amendment). Thus, this Honorable Court has yet to consider the impact that the Sixth Amendment will have on Federal Rule of Evidence 702 and the trial judge's role as the "keeper" when possible exculpatory evidence stands ready at the "gate."

The highest military appellate court readily recognized the impact that due process rights will have on the admission of polygraph evidence in *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987). That court discussed the due process impact in two respects: "First, in deciding whether defense evidence satisfies the relevance and helpfulness standards; second, in deciding whether the probative value of the evidence is outweighed by extraneous factors (Mil. R. Evid. 403)." *Id.* at 252.[67] The implicit suggestion gleaned from *Gipson* is that a trial judge should consider the nature of the purported exculpatory evidence as an additional factor of the *Daubert*/Rule 702 expertise analysis. This factor, incorporating Sixth Amendment due process concerns, must be afforded more weight than other items on the non-exclusive *Daubert* list.

[67] The court added that "[p]erhaps in these areas, judges should bend even further than normal in the direction of giving the accused the benefit of doubt...[I]f anything, in marginal cases, due process might make the road a tad wider on the defense's side than on the Government's." *Id.*

The Supreme Court has applied the Sixth Amendment in a variety of contexts in order to protect a criminal defendant's due process rights. In *Washington v. Texas*, 388 U.S. 14 (1967), this Court invalidated a state statute concerning competency of codefendants where it worked to prevent an accused from obtaining testimony from a witness.[68] Furthermore, in *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Court recognized that a state hearsay rule compromised the right to call witnesses on one's behalf.[69] Finally, a state's legitimate interest in barring unreliable evidence does not extend to a *per se* exclusion of evidence which is arguably reliable in a given case. *Rock v. Arkansas*, 483 U.S. 44 (1987).[70]

With the exception of New Mexico, the States fail to recognize the supremacy of valid Sixth Amendment rights over any 'legitimate' concern a particular jurisdiction might have with polygraphs.[71] While many States have refused to adopt *Daubert* as controlling on their evidence code, [72] no state's interpretation can operate contrary to express constitutional protections and rights. The Sixth Amendment mandates admission of exculpatory polygraphs in federal courts and, by virtue of the Fourteenth Amendment, in state trials.

---

[68] The defendant wanted to present testimony from a co-accused, contrary to a state rule disallowing such testimony, regarding his attempts to prevent the co-accused from shooting the deceased. *Washington v. Texas*, 388 U.S. at 16.

[69] In *Chambers*, a defense witness made several confessions to the murder for which the accused faced trial, but impeachment of one's own witness was foreclosed under state law. 410 U.S. at 289.

[70] In *Rock*, a *per se* rule impermissibly prevented the defendant from testifying about hypnotically refreshed memories. 483 U.S. at 62.

[71] A much-repeated fear among the anti-polygraph states is that "polygraph evidence will impermissibly infringe on the province of the jury to determine credibility." *See* Brief of the State of Connecticut and 27 States as Amici Curiae in Support of Petitioner at 19-20. *See also* Petitioner's Brief at 26-29. This lack of confidence, given the sophistication of the modern venireman, is misplaced for a group often trusted with far more complicated, "near-infallible," evidence, such as DNA or rape trauma syndrome, and is certainly not reflective of the experience with courts-martial panels in the military justice system. "If we can have faith in a state trial jury, as suggested by the research to date, there is all the more reason to have faith in the court-martial panels that you present scientific evidence to." *See* M. Maxwell et al., *Recent Developments Concerning the Constitutionality of Military Rule of Evidence 707*, The Army Lawyer (DA Pam 27-50-265) 13, 16 (Dec. 1994) (quoting E. Imwinkelried, *The Standard For Admitting Scientific Evidence: A Critique From The Perspective of Juror Psychology*, 100 Mil. L. Rev. 99, 117 (1983)). Military juries are generally well-educated and sophisticated enough to understand complex evidence. The Uniform Code of Military Justice [hereinafter U.C.M.J.] provides that military jurors must be either commissioned or warrant officers, or enlisted persons senior in rank to the accused, selected on the basis of their "age, education, training, experience, length of service, and judicial temperament." U.C.M.J. art. 25(d)(2), 10 U.S.C. § 825(d)(2) (1982).

[72] *See* Appendix (Summary Chart of State Jurisdictions).

C. The Court of Appeals for the Armed Forces decision in the case *sub judice* was properly decided on Sixth Amendment grounds

The decision in *United States v. Scheffer*, 44 M.J. 442 (C.A.A.F. 1996), reflects the latest iteration in a series of attempts to define the constitutionality of categorically excluding polygraph evidence under Military Rule of Evidence 707 [hereinafter Rule 707]. As military courts have struggled with this issue, the resultant body of appellate law supports the proposition that Rule 707 is at odds with recent scientific evidence litigation and the Constitution itself.

As a direct result of the *Gipson* decision, Rule 707 was drafted in 1991 to categorically exclude from courts-martial any evidence relating to polygraph examinations. The basis for this rule, as laid out in the Manual for Courts-Martial's analysis of the Military Rules of Evidence, is the danger of polygraph tests misleading a jury by appearing "shrouded with an aura of near infallibility." Manual for Courts-Martial, United States, 1984, app. 22, Military Rules of Evidence analysis, at A22-48 (citing *United States v. Alexander*, 526 F.2d 161, 168-169 (8th Cir. 1975)). Furthermore, the drafters of the rule were also concerned with the reliability of polygraph examinations. *Id.*

Military Rule of Evidence 707 was created contrary to a body of constitutional case law which recognizes that certain categorical evidentiary rules violate an accused's due process rights. The *Scheffer* opinion cites *Washington v. Texas* and *Rock v. Arkansas* as evidence of this Court's vigilance in protecting against similar Sixth Amendment abuses. *Scheffer*, 44 M.J. at 445.[73] Furthermore, the Armed Forces court noted the 'liberal thrust' of the Federal Rules of Evidence and the *Daubert* "gatekeeper" function wherein a judge must still apply a Rule 403[74] analysis prior to admitting or excluding such evidence. This gatekeeper function is the logical manifestation of a sound policy favoring the discretion of a sitting judge, who is familiar with the Constitution, over the collective opinion of the scientific community.

The case of *United States v. Williams*, 39 M.J. 555 (A.C.M.R. 1994), was an early foray of the military courts into the Sixth Amendment implications of Rule 707. [75] In *Williams*, the Army Court of Military Review (now the Army Court of Criminal Appeals [hereinafter Army court]) rejected the policy con-

---

[73] The Armed Forces court noted that "the majority of federal circuits do not have a *per se* prohibition against polygraph evidence." *Id.* at 444.

[74] Military Rules of Evidence 403 is identical to the federal Rule 403.

[75] The Armed Forces court later reversed the Army court on the basis that the accused had not testified at trial and could not present exculpatory polygraph evidence without first taking the stand. *United States v. Williams*, 43 M.J. 349 (C.A.A.F. 1995). However, in the case at bar, appellant did testify at trial.

siderations articulated in support of a *per se* exclusion of polygraph evidence.[76] The *Williams* court held that the rule violated the appellant's Fifth Amendment right to a fair trial and Sixth Amendment right to produce favorable witnesses. *Id.* at 558. The Army court noted that Rule 707 does not even allow a judge to inquire whether polygraph evidence is relevant and helpful.

Against this backdrop of constitutional authority, the Armed Forces court found Rule 707 unconstitutional in the case at bar. The court held that "[a] *per se* exclusion of polygraph evidence offered by an accused to rebut an attack on his credibility, without giving him an opportunity to lay a foundation under Mil. R. Evid. 702 and *Daubert*, violates his sixth Amendment right to present a defense." *Scheffer*, 44 M.J. at 445. Thus, the gravamen of the court's holding below is rooted in the basic constitutional right to present a defense.[77]

This Court is ideally poised, then, to affirmatively recognize an accused's right to lay a foundation for the presentment of exculpatory polygraph evidence in their defense at trials by courts-martial. Furthermore, the polygraph is no longer an untested, unreliable sideshow gimmick but has gained acceptance, especially in the Department of Defense, to such an extent that many Government agencies have posited concerns of national security on the results of polygraph examinations.[78] Thus, if polygraph exams can result in the grant or denial of access to sensitive and critical areas impacting the security of millions of Americans — it follows that one American, especially a soldier, sailor, airman, or marine, should be allowed to present similar evidence to a panel who sits in judgment of the servicemember's guilt or innocence.

D. This Court should adopt amicus' proposed preliminary due-process *Daubert* factor

Trial courts must be required to weigh the potential due process concerns in criminal cases before continuing with the standard *Daubert* analysis concerning the admission of expert scientific evidence. The amicus therefore proposes that this Honorable Court delineate a "new" factor for Rule 702 consideration. The Court should prescribe this factor as a preliminary question for criminal

---

[76] In particular, the court described as "disingenuous" the rationale to exclude polygraph evidence based on its inherent unreliability, or "at best incongruous with the substantial investment the Department of Defense has made, and continues to make, in polygraph examinations." *Williams*, 39 M.J. at 558.

[77] Several jurisdictions, discussed *supra*, would eschew a categorical ban on a particular type of evidence in favor of allowing a court to conduct the customary Rule 401/403 balancing. *See, e.g., United States v. Posado*, 57 F.3d at 434.

[78] *See Williams*, 39 M.J. at 558.

trial judges, as gatekeepers of novel scientific evidence, to contemplate. As proposed:

> The defense will be granted the opportunity to lay a foundation for the presentment of science-based expert evidence under a *Daubert*/Rule 403 analysis where the proffered evidence is relevant to a constitutional right of the accused. Admission of such proffered expertise is presumed in cases affecting a valid constitutional right and where the defense demonstrates the reliability of the technique. A guarantee of reliability can be demonstrated in a variety of manners, is dependent upon the facts of a given case, and is not limited to the following circumstances which tend to enhance reliability of a particular test: compliance with any statutory scheme providing for admission; whether the test was conducted by a qualified expert; whether the test procedures provide a trustworthy result; whether the examination is recorded for later observation; whether the opposing party has the ability to independently assess technique reliability; which party initiated the use of the technique in each case; whether the opposing party has a reasonable opportunity to conduct its own test; as well as any other conditions which tend to enhance reliability.

In applying this proposed standard to *Scheffer*, it is noteworthy that a Government law enforcement agency initiated and performed the exam in question. *Scheffer*, 44 M.J. at 443.[79] The military judge, under the standard *Daubert* analysis, should have admitted this exculpatory polygraph given the guarantees of reliability present in the case *sub judice*. The proposed due process factor, with its presumption, would operate to admit the Government-initiated exculpatory polygraph results.

Airman Scheffer's Sixth Amendment right to present a defense cannot be eviscerated by a mechanical *per se* exclusionary rule of evidence. The respondent was subjected to an attack on his credibility which Rule 707 left him powerless to defend against.[80] Had the military judge performed the proposed due

---

[79] *See State v. Baca*, 902 P.2d 65 (N.M. 1995) (justice and fairness dictated admission where State administered examination and knew results).

[80] The prosecution cross-examined Scheffer about the inconsistencies between his testimony and earlier statements to law enforcement. The Government's closing argument stressed that, "He lies. He is a liar. He lies at every opportunity he gets and he has no credibility. Don't believe him." *Scheffer*, 44 M.J. at 444.

process analysis in the case at bar, Airman Scheffer would have been able to defend the attack on his credibility after he testified. An abuse of discretion standard of review will continue to be applied to a judge's determination on expertise admissibility to ensure consideration of the due process factor. *See Scheffer*, 44 M.J. at 447 (ruling on admissibility will not be reversed unless a clear abuse of discretion) (citing *Piccinonna*, 885 F.2d at 1537; *United States v. Pettigrew*, 77 F.3d 1500, 1514 (5th Cir. 1996)).

This test also should be applied whenever a Confrontation Clause or other constitutional right is implicated. If, for example, the accused has evidence that a prosecution witness "failed" a relevant polygraph examination, then a judge should perform the proposed analysis. This additional due process factor could also be applied to cases involving novel scientific techniques other than the polygraph. An accused's request to present exculpatory "astrological" evidence would likely fail due to the lack of a scientific foundation or any serious intellectual debate about the technique.

As this Court first recognized in *Rosen v. United States*, 245 U.S. 467, 471 (1918), "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding . . . leaving the credit and weight of such testimony to be determined by the jury." It is time for criminal courts to end the irrational fear of polygraphy born of the obsolete and crude technology of 1923.[81] The proposed due process factor will empower trial judges to recognize the validity of polygraphs where it is essential to ensure a fair trial and grant the accused a reasonable opportunity to present a defense. Above all else, "the Sixth Amendment was designed in part 'to make the testimony of a defendant's witnesses admissible on his behalf in court.'" *Rock v. Arkansas*, 483 U.S. at 54 (quoting *Washington v. Texas*, 388 U.S. at 22). Therefore, in light of the sound policy reasons discussed above, this Honorable Court should extend the constitutional protections heretofore recognized to servicemembers, notwithstanding any presidential rulemaking to the contrary.

[81] As John Wigmore observed in 1923 at the time *Frye* was decided: "'If there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it.'" James R. McCall, Misconceptions and Reevaluation—Polygraph Admissibility After Rock and Daubert, 1996 University of Illinois Law Review 363, 370 (*quoting* John H. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 875, at 237 (2d ed. 1923).

CONCLUSION

The decision of the Court of Appeals for the Armed Forces should be affirmed.

Respectfully submitted,

JOHN T. PHELPS II*
Colonel, U.S. Army
Chief, Defense Appellate Division

STEPHEN P. BELL, JR.
Captain, U.S. Army
Defense Appellate Attorney

MICHAEL E. HATCH
Major, U.S. Army
Defense Appellate Attorney

T. MICHAEL GUIFFRÉ
Captain, U.S. Army
Defense Appellate Attorney

PAUL FIORINO
Captain, U.S. Army
Defense Appellate Attorney

ARDEN B. LEVY
Captain, U.S. Army
Defense Appellate Attorney

AUGUST 1997

* Mr. Lloyd C. Peeples III (Cumberland School of Law, Samford University, Class of 1998) made a significant contribution to the research and writing of this brief, along with Captain Jayanth Jayaram, U.S. Army (University of Illinois College of Law, Class of 1998), Ms. Tiffany R. Spann (University of South Carolina School of Law, Class of 1998), and Cadet Robert J. Hannah (U.S. Military Academy, Class of 1998).

APPENDIX

Summary Chart of State Jurisdictions

State	Uses FRE 702?	Uses *Daubert* or *Frye*?	Polygraph Admissible
Alabama	Yes	Has not addressed *Daubert* - Uses *Frye*	Stipulation
Alaska	Yes	Rejects *Daubert* - Uses *Frye*	Inadmissible
Arizona	Yes	Rejects *Daubert* - Uses *Frye*	Stipulation
Arkansas	Yes	Follows *Daubert*	Stipulation
California	No	Rejects *Daubert*	Stipulation
Colorado	Yes	Rejects *Daubert* - Uses *Frye*	Inadmissible
Connecticut	No	Follows *Daubert*	Inadmissible
Delaware	Yes	Follows *Daubert*	Stipulation
Florida	Yes	Rejects *Daubert* - Uses *Frye*	Stipulation
Georgia	Yes[1]	Has not addressed *Daubert* - Uses rule similar to *Daubert*	Stipulation
Hawaii	Yes[1]	Has not addressed *Daubert* - Uses rule similar to *Daubert*	Inadmissible
Idaho	Yes	Has not addressed *Daubert* - Uses rule similar to *Daubert*	Stipulation
Illinois	No	Rejects *Daubert* - Uses *Frye*	Inadmissible
Indiana	Yes	*Daubert* not binding, but "helpful"	Stipulation
Iowa	Yes	Follows *Daubert*	Stipulation
Kansas	Yes[1]	Rejects *Daubert* - Uses *Frye*	Stipulation
Kentucky	Yes	Follows *Daubert*	Inadmissible
Louisiana	Yes	Follows *Daubert*	Inadmissible
Maine	Yes	Has not addressed *Daubert* - Uses rule similar to *Daubert*	Inadmissible
Maryland	Yes	*Daubert* incorporated into state statute	Inadmissible
Massachusetts	No	Follows *Daubert*	Inadmissible
Michigan	Yes	Has not addressed *Daubert* - Uses *Frye*	Inadmissible

[1] State did not adopt FRE 702, but the rule for admissibility is very similar.

State	Uses FRE 702?	Uses *Daubert* or *Frye*?	Polygraph Admissible
Minnesota	Yes	Acknowledges *Daubert* - Uses *Frye*	Inadmissible
Mississippi	Yes	Has not addressed *Daubert* - Uses *Frye*	Inadmissible
Missouri	Yes	Acknowledges *Daubert* - Uses *Frye*	Inadmissible
Montana	Yes	Follows *Daubert*	Inadmissible
Nebraska	Yes	Rejects *Daubert* - Uses *Frye*	Inadmissible
Nevada	Yes	Has not addressed *Daubert* - Uses rule similar to *Daubert*	Stipulation
New Hampshire	Yes	Has not addressed whether *Daubert* supersedes *Frye*	Inadmissible
New Jersey	No	Acknowledges *Daubert* - Uses *Frye*	Stipulation
New Mexico	Yes	Follows *Daubert*	Admissible
New York	No	Rejects *Daubert* - Uses *Frye*	Inadmissible
North Carolina	Yes	Uses rule similar to *Daubert*	Inadmissible
North Dakota	Yes	Acknowledges *Daubert* - Uses *Frye*	Stipulation
Ohio	Yes	Has not addressed *Daubert* - Uses rule similar to *Daubert*	Stipulation
Oklahoma	Yes	Follows *Daubert*	Inadmissible
Oregon	Yes	Has not addressed *Daubert* - Uses 401/403 balancing test	Inadmissible
Pennsylvania	No	Rejects *Daubert* - Uses *Frye*	Inadmissible
Rhode Island	Yes	*Daubert* question still open - Uses rule similar to *Daubert*	Inadmissible
South Carolina	Yes	Never adopted *Daubert* or *Frye*	Inadmissible
South Dakota	Yes	Follows *Daubert*	Inadmissible
Tennessee	Yes	Has not addressed *Daubert* - Uses rule similar to *Daubert*	Inadmissible
Texas	Yes	Has not addressed *Daubert* - Uses rule similar to *Daubert*	Inadmissible
Utah	Yes	Has not addressed *Daubert* - Uses rule similar to *Daubert*	Stipulation

State	Uses FRE 702?	Uses *Daubert* or *Frye*?	Polygraph Admissible
Vermont	Yes	Uses rule similar to *Daubert*	Inadmissible
Virginia	No[2]	Has not addressed *Daubert* - Uses rule similar to *Daubert*	Inadmissible
Washington	Yes	Rejects *Daubert* - Uses *Frye*	Stipulation
West Virginia	Yes	Follows *Daubert*	Inadmissible
Wisconsin	Yes	Has not addressed *Daubert* - Uses rule similar to *Daubert*	Inadmissible
Wyoming	Yes	Follows *Daubert*	Stipulation

[2] Virginia has not adopted FRE 702 for criminal cases.